

Date: September 22, 1997

Case Nos.: 97-STA-10
97-STA-19

In the Matter of:

WILLIAM E. GRIFFIN,
Complainant,

v.

CONSOLIDATED FREIGHTWAYS
CORPORATION OF DELAWARE
(dba CF Motorfreight),
Respondent,

WILLIAM E. GRIFFIN
Pro Se

DEBORAH C. CRAYTOR, Esq.
M. KIRBY C. WILCOX, Esq.
For Respondent

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from claims filed under the Surface Transportation Assistance Act of 1982 ("the Act"), 49 U.S.C. §31105.

A formal hearing was held in this case on May 28, 1997, in Atlanta, Georgia. Complainant offered Exhibits CX-1 through CX-4.¹ Consolidated Freightways (hereinafter "Respondent" or "CF")

¹The following abbreviations will be used as citations to the record:

CX - Complainant's Exhibits

RX - Respondent's Exhibits

offered Exhibits RX-1 through RX-50.² All were admitted into evidence. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Respondent and Complainant stipulated to and I find the following facts:

1. Respondent is a commercial motor carrier subject to the Act.
2. Respondent is a person, as defined by the Act.
3. Complainant is an employee of Respondent and is currently on an unpaid medical leave of absence.
4. Respondent removed Complainant from active driving service on May 28, 1996.
5. Respondent continued Complainant's pay from May 28, 1996, through October 5, 1996.

(Tr. 7-9)

ISSUES

1. Whether Complainant engaged in protected activity.
2. Whether Complainant was subject to adverse action due to the following:
 - a. Complainant's removal from service on May 28, 1996.
 - b. Termination of Complainant's pay on October 6, 1996.
 - c. Respondent's disclosure to a prospective employer, on November 4, 1996, that Complainant was on medical leave because he was temporarily unfit for service.

TR - Transcript.

²RX-49 is listed as "all documents produced by Complainant in response to Respondent...Request for Production of Documents." Complainant produced no documents pursuant to this request and, therefore, there are no documents contained in RX-49.

3. Whether Respondent was aware of the protected activity when it took each of the above adverse actions.
4. Whether Complainant presents sufficient evidence to raise an inference that the protected activity was the likely reason for the adverse actions.
5. Whether Respondent had a legitimate, non-discriminatory reason for the actions above.

FINDINGS OF FACT

A. Testimony of Dr. Harley Stock

Dr. Harley Stock, a board certified forensic psychologist, evaluated Complainant at the request of Respondent (Tr. 39, 54). Dr. Stock has earned a B.A. in psychology, an M.A. in emotionally disturbed children, an M.S. in psychology, and a Ph.D. in psychology (Tr. 36). He has focused his work for the past several years on high risk threat assessment in the workplace (Tr. 38).³ Although Dr. Stock is licensed to practice in the states of Florida and Michigan, he is permitted to do one time evaluations in other states, including Georgia, under a limited reciprocity program (Tr. 40). At the hearing, I accepted Dr. Stock as an expert in forensic psychology and threat assessment over Complainant's objection (Tr. 44).

Dr. Stock described the general process he uses when performing a threat assessment. He usually receives a call from an employer with a concern about an individual who is displaying threatening or uncomfortable behavior, either written or verbal, or both. Dr. Stock requests documentation of the employer's concerns. If he feels there is a need for further analysis after considering the documentation provided by the employer, Dr. Stock will schedule a fitness for duty evaluation. While this evaluation is pending, Dr. Stock encourages the removal of the employee from service, because an issue has been raised as to whether the employee is dangerous (Tr. 45).

The fitness for duty evaluation is a two-part process. First, several specialized psychological tests are performed to determine the areas of potential violence. Second, Dr. Stock conducts an interview with the identified employee (Tr. 46). He usually conducts this interview in a hotel conference room as Dr. Stock has a nationwide practice and does not want to bring a potentially dangerous employee to the workplace (Tr. 48). Dr. Stock requires that the employee sign a consent form waiving the normal psychologist/patient privilege, and discharging his firm of liability (Tr. 49; RX-13). Because the employees, who he is interviewing, have been identified as possible threats, Dr. Stock always has security present at these interviews (Tr. 49). Dr. Stock begins the interview by taking a detailed history of the employee's school, family, friends, and work experiences (Tr. 53).

³Dr. Stock's curriculum vitae appears at RX-10.

Upon review of the psychological tests, interview, and collateral sources of information, Dr. Stock will make one of four recommendations: 1) fit for duty; 2) fit for duty, but in need of mandatory counseling; 3) *temporarily* unfit for duty even with mandatory counseling, but a possibility of rehabilitation through treatment; and 4) unfit for duty because counseling is unlikely to change the situation (Tr. 46-7).

Dr. Stock testified that he followed this general pattern of analysis in his dealings with Mr. Griffin and CF. Prior to performing the evaluation of Complainant, Dr. Stock had not worked for Respondent (Tr. 54). When Respondent contacted Dr. Stock with regard to Complainant, it provided Dr. Stock with several collateral sources of information including the May 12, 1996, letter from Mr. Griffin to Judge Mollie Neal (RX-1), statements made by Mr. Griffin in his May 20-21, 1996, deposition (RX-4, 141, 340), and an informal assessment of Mr. Griffin by Dr. Richard Wyatt (RX-2; Tr. 56). Based on an evaluation of these documents, Dr. Stock recommended that Respondent remove Complainant from service, but continue to pay him to avoid making a difficult situation worse by creating financial problems for Complainant (Tr. 57). He made this recommendation prior to meeting Complainant in person based solely on the documentary evidence (Tr. 83).

Dr. Stock scheduled psychological tests with Dr. David Pritchard, a board certified psychologist specializing in neuropsychology, on May 29, 1996 (Tr. 59). Dr. Stock also conducted a thorough forensic threat assessment and interview with Complainant, which lasted approximately seven to seven and a half hours on May 31, 1996 (Tr. 60). Prior to the interview, Dr. Stock required Complainant to sign a "consent for fitness for duty evaluation" form, which Complainant did, "under protest" (RX-13).

Upon review of all the evidence before him, Dr. Stock diagnosed Complainant with delusional disorder, persecutory type (Tr. 68).⁴ He found Mr. Griffin temporarily unfit for duty and ordered mandatory psychological counseling based, *inter alia*, on Complainant's attribution of his problems to others and his paranoid delusions of being followed (Tr. 71). Dr. Stock acknowledged that Complainant denied any threatening behavior, but found his future behavior to be unpredictable and indicated that he may pose a danger to others should he continue to operate a truck (RX-15, 2-3). The tests administered by Dr. Pritchard had only marginal validity because Complainant attempted to "present himself in an unrealistically favorable light" (RX-25, 9; Tr. 64). One test indicated that Complainant had a high risk for lack of work preparation, lack of social concerns/judgment, denial

⁴DSM-IV provides the following definition of delusional disorder, persecutory type:

Persecutory Type - . . . [C]entral theme of the delusion involves the person's belief that he or she is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals. Small slights may be exaggerated and become the focus of a delusional system. The focus of the delusion is often on some injustice that must be remedied by legal action and the affected person may engage in repeated attempts to obtain satisfaction by appeal to the courts and other government agencies. Individuals with persecutory delusions are often resentful and angry and may resort to violence against those they believe are hurting them. (RX-16)

of shortcomings and/or lack of internalized sense of responsibility. Again, Complainant was unusually defensive when taking this test, denying even minor faults and unwilling to admit shortcomings or mistakes. Another test indicated Complainant was unusually insensitive to social cues and may not understand other people's actions toward him (RX-25, 9-10).

Dr. Stock submitted an interim report to Respondent on June 10, 1996 (RX-15, 2). After stating his diagnosis, Dr. Stock pointed to several incidents that Complainant relayed to him which lead him to his diagnosis.

He believes that his daughter's picture in the debutante ball program was intentionally caused to be switched, that his son's applications to colleges were interfered with, and that his participation in the local high school band program has been sabotaged. He believes that "young girls" are behaving in a seductive manner towards him in the local malls, as well as attractive young women showing up in motels where he is staying, trying to influence him. He believes that the EEOC has a "special" squad whose purpose is to cause people to "go over the edge."⁵ . . . He believes that people who work in stores that he frequents are not actually store employees but are planted there by the EEOC in an attempt to gather information on him. Additionally, he believes that EEOC representatives actually work, for example, for the Post Office but are sent to spy on him. He also believes that certain individuals, when he drives his truck, are following him.

In Dr. Stock's final report, dated October 1, 1995, he detailed the reasons for his diagnosis. Dr. Stock stated:

He has absolutely no insight into his own behavior and blames other people for any difficulties that he experiences in life. His delusions include those of being followed, spied upon and having his life influenced. . . . Although Mr. Griffin denies any threatening behavior, individuals with delusion disorder, paranoid type, are often reactive to their environment. His delusional disorder is currently interfering with his occupational and interpersonal interactions. He is overtly suspicious of co-workers and even other drivers on the street. He lacks insight into his disorder and is likely to be noncompliant with treatment plans. He denies having access to weapons and also denies any suicidal/homicidal ideation. . . . Mr. Griffin's delusional disorder, paranoid type, could cause him, in the immediate future, to engage in inappropriate behavior toward others that he believes are out to harm him or hurt him. Since his delusional disorder is so widespread, it is not possible to identify a particular target of the population. Thus, he could act out against co-workers, the EEOC spies that work in

⁵Complainant indicated this belief in his deposition in March 1997. He stated, "There is a group or agency that harasses postal workers to the point where they go berserk and start shooting people. People can be harassed to a point where they just lose it. EEOC may have special people to do this" (RX-25, 9).

the various stores that he frequents, or cars that he sees on the road that he believes are following him. (RX-25, 10-11).

He further indicated that Complainant's mental illness had begun recently (Tr. 74).

Dr. Stock recommended that CF not tell Complainant of his specific diagnosis, but to place him on paid leave and provide the names of two possible psychiatrists for further treatment (Tr. 76). He opined that hearing of the diagnosis without accompanying counseling would be psychologically harmful to Complainant (Tr. 76). Dr. Stock contacted the two psychiatrists to determine if they had dealt with an individual with delusional disorder previously and if they were willing to treat one with that diagnosis (Tr. 76).

Following his analysis, Complainant contacted Dr. Stock requesting his test results. Dr. Stock sent a letter dated October 11, 1996, to Complainant, indicating the results of the psychological tests and the conclusions reached from those tests and the interview conducted on May 31, 1996, but the certified letter was returned (RX-28; Tr. 78).

B. Testimony of Ernest Anthony Smith

Mr. Smith is a dispatch operations manager for Respondent and has worked for Respondent for more than twenty-three years (Tr. 102, 110). His duties in this position include interaction with the transport operators, drivers, and staff and overseeing daily operations (Tr. 102). Smith testified that Complainant is currently employed by CF but is on a leave of absence (Tr. 102). Smith was not involved in the decision to removed Complainant from service or to terminate his pay (Tr. 103).

Super Service, a prospective employer of Complainant, contacted Smith regarding Complainant's status at CF and he provided Complainant's employment dates only (Tr. 103). After this contact, Jerry Ard, CF's group operations manager at the Ellenwood, Georgia facility, received a call from Super Service. Ard, also, gave no substantive information to Super Service (Tr. 105). Smith testified that he did not give the representatives of Super Service any information beyond what was contained in the form sent to Super Service (RX-34, exh.1; Tr. 106). Specifically, Smith indicated that he did not tell Super Service of Complainant's pending claim against Respondent (Tr. 106).

Smith testified to an incident with Complainant which he perceived as a threat which occurred on May 16, 1996 (Tr. 107; RX-3). Smith overheard a conversation between Complainant and another individual wherein Complainant stated that he had some grievances that he was "going to wipe Smith's ass with" (Tr. 108). Smith was not sure whether this was a physical threat or not, but interpreted it as a threat to himself (Tr. 109).

C. Testimony of Steve Nail

Nail is the safety and personnel director for Super Service, Incorporated (Tr. 119). Mr. Griffin applied for employment with Super Service on October 23, 1996. In reviewing this

application, Nail obtained a motor vehicle report and a DAC report⁶ on Complainant. Because CF does not participate in DAC, Nail called CF and faxed a request for information regarding Complainant's employment (Tr. 119-120). Jerry Ard brought the response to Nail on October 29, 1996. Respondent did not provide any substantive information about Complainant either during the phone call or during Ard's visit (Tr. 121). Following this investigation, Nail hired Mr. Griffin on October 31, 1996.

On November 4, 1996, Nail received a letter from Respondent stating that Complainant was "currently on an unpaid medical leave of absence, as a result of medical information indicating that he is temporarily unfit for service" (RX-32; Tr. 123).⁷ When Nail questioned Complainant regarding this letter, Mr. Griffin informed Nail that Respondent was trying to kill him and that he had several suits pending against Respondent (Tr. 124, 126). Respondent never informed Nail that Complainant was out of service because of a mental condition (Tr. 129).

Complainant continued working for Super Service until January 7, 1997, when he was terminated for insubordination and willful disregard (Tr. 127). Nail met with Complainant to discuss the fact that his dispatcher had written him up several times (RX-31). In response, Complainant was loud, disrespectful, demanding and admitted no wrong-doing. Nail alleged that Complainant had refused a dispatch, violated the 70-hour rule, and drove out of his route by 260 miles. As Complainant left this meeting he continued to yell and had not returned his keys and fuel card to Super Service (RX-31). Nail specifically testified that Complainant was not terminated due to the letter from Respondent, dated November 4, 1996 (Tr. 127).

D. Testimony of Bradley E. Egelston

Egelston has been the director of human resources for Leland James Service Corporation, a fully-owned subsidiary of Respondent, since December 1996. Prior to that, he worked for twenty years for Respondent and was the manager of human resources since November 1992 (Tr. 133-4).

Egelston first met Mr. Griffin on July 5, 1995, when they met to discuss his OSHA claim (Tr. 135). Complainant indicated that there was a conspiracy among the supervisors at CF to improperly load his trailers and to force him to drive unsafe equipment (Tr. 135-6). Egelston investigated Complainant's claim, but found no support for it (Tr. 136).

On February 20, 1996, Complainant complained to Egelston of harassment by his dispatcher (Tr. 137). Egelston offered to join Complainant in his pre-trip inspection to determine if there were any safety violations, insure that the equipment was hooked up properly and met all safety regulations (Tr. 139). They discovered no problems with Complainant's vehicle at this time. Complainant

⁶Nail testified that a DAC report is generated from a central location. A majority of trucking companies report employee information to DAC and this information can be pulled by Super Service or other trucking companies.

⁷When shown a copy of this letter, Complainant indicated that RX-32 was not the letter which Nail had shown him while employed at Super Service (RX-34, 39).

indicated that he thought Egelston had arranged for the equipment to meet regulations to debase Mr. Griffin's complaints. Egelston informed him that he, in fact, had not done so (Tr. 139).

On May 15, 1996, Egelston received a copy of a letter written by Complainant to Judge Mollie Neal (Tr. 140; RX-1). Egelston contacted Dr. Richard Bloom, seeking a referral to someone who could review this letter to determine if Complainant posed a potential danger (Tr. 141). Dr. Bloom referred the letter to Dr. Richard Wyatt, who opined that the letter may show the existence of a mental disorder (Tr. 142; RX-2). Dr. Wyatt opined that, because of the number and character of the claims of harassment, the letter raised a question as to whether Complainant had developed a delusional disorder. Dr. Wyatt indicated that this raised a concern for "potentially dangerous behavior during employment activities" (RX-2).

Egelston became more concerned about Complainant based on comments Complainant made at his May 20-21, 1996, deposition (Tr. 143). Complainant alluded to the crash of the ValuJet plane in Florida, which Egelston felt indicated that Complainant may try to cause an accident to get the company's attention (Tr. 143). Complainant also made several comments off the record to counsel for Respondent, Deborah Craytor. Complainant indicated that Craytor had arranged to have his house broken into and documents stolen, had been behind the theft of Complainant's car, and worked for the National Labor Relations Board (NLRB) (Tr. 143-4). Following these statements, Egelston contacted Respondent's deputy general counsel for suggestions on what further investigation of Complainant's behavior could be taken (Tr. 144). Slate recommended the Incident Management Group (IMG) to further evaluate Complainant (Tr. 144).

Egelston contact IMG on May 21, 1996, and spoke to Dr. Stock. He arranged to meet Dr. Stock on May 23, 1996, and at that time Dr. Stock suggested that Complainant be taken out of service pending a psychological evaluation (Tr. 145). Pursuant to the recommendation, Respondent removed Complainant from service on May 28, 1996. Mr. Griffin was informed of this action by letter and a personal meeting with Respondent's safety supervisor, Jack Tisdale (Tr. 147; CX-2; RX-12⁸). Tisdale was chosen to inform Complainant based on Dr. Stock's recommendation that the decision be communicated by someone who was not based in Atlanta and whom Complainant might consider to be involved in the situation (Tr. 147). Respondent indicated that Complainant would continue to be paid until the testing and evaluation findings were available contingent upon: 1) Complainant's completing the scheduled evaluation with Dr. Stock; 2) Complainant's not returning to the Atlanta Service Center in Ellenwood, Georgia until Respondent notified him of his return-to-work date; 3) Complainant not contacting any CF employees regarding his complaints (CX-2; RX-12).

Following Dr. Stock's evaluation and testing, he informed Egelston that Complainant suffered from paranoid delusional disorder, persecutory type and that Complainant was temporarily unfit for duty with the need for counseling (Tr. 148). Egelston met with Complainant on June 13, 1996, to discuss Dr. Stock's recommendation without discussing the actual diagnosis, on Dr. Stock's

⁸CX-2 and RX-12 are identical.

recommendation (Tr. 149). On that same day, Egelston gave Complainant a letter detailing the company's position. Complainant was informed that he would be placed on leave under the Family and Medical Leave Act and his pay continued for up to twelve weeks contingent on four conditions (Tr. 150; RX-17). First, Complaint would select one of the psychiatrists recommended by Dr. Stock and contact this physician prior to June 17, 1996. Second, Complainant must participate in a treatment program as recommended by the selected psychiatrist. Third, Complainant must sign a release so the treating psychiatrist could advise Respondent as to whether Complainant was participating in the treatment. Finally, Complainant was not to return to the Atlanta Service Center in Ellenwood, Georgia until Respondent notified him of his return-to-work date (Tr. 150-1; RX-17). Egelston testified that it is not CF's policy to continue pay for employees on medical leave of absence, but this was done in Griffin's case on Dr. Stock's recommendation (Tr. 151). Complainant failed to comply with these conditions, and Egelston informed him on October 7, 1996, that they would discontinue his wages effective October 12, 1996 (Tr. 154; CX-3; RX-26⁹).

Both the letter on May 28, 1996, notifying Complainant that he was removed from service, and the letter on June 13, 1996, notifying Complainant of the conditions of his continued employment, were signed by Egelston, but were authored in consultation with Ms. Craytor and Dr. Stock (Tr. 151). Complainant was entitled to a second opinion, at Respondent's expense, under the collective bargaining agreement with CF, but Complainant did not avail himself of that option, even upon the recommendation of Judge Mollie Neal, Respondent, and his union representatives (Tr. 152, 155; RX-20, 3; RX-21; CX-3; RX-26; RX-23; RX-29; RX-30). Complainant refused to have another medical evaluation until Respondent gave an explanation for the initial evaluation by Dr. Stock, and he received a copy of the results of that evaluation (RX-35, 110).

Egelston sent a letter to Super Service, Complainant's prospective employer, in October 1996 (Tr. 157). Egelston felt an obligation to inform Super Service of possible liability and to avoid any liability on the part of Respondent (Tr. 158). This letter stated that Complainant was "currently on an unpaid medical leave of absence, as a result of medical information indicating that he is temporarily unfit for service" (RX-32). Aside from this letter and the verification form, Respondent had no other contact with Super Service regarding Complainant (Tr. 158).

E. Deposition Testimony of William E. Griffin, Complainant.

Complainant was deposed on May 20-21, 1996 and March 25, 1997, but did not testify at the hearing (RX-4; RX-34).

Complainant began working for Respondent on November 17, 1984, as a line haul driver transport operator working out of the Atlanta Service Center (RX-4, 27).¹⁰ He is a high school graduate and has enrolled in some college level courses (RX-4, 34). In an earlier proceeding before Judge Mollie Neal, Complainant charged Respondent with harassment based on twenty-three

⁹CX-3 and RX-26 are identical.

¹⁰The Atlanta Service Center is actually located in Ellenwood, Georgia.

incidents wherein Complainant thought his trailer had been improperly loaded or his equipment was unsafe (RX-4, 68-186). At the time of the hearing, Complainant worked for J & C Transport as an over-the-road driver (RX-34, 88).

Complainant's letter to Judge Mollie Neal, dated May 12, 1996, details his view of the harassment of himself by Respondent (RX-1). Complainant lists fifty-one individuals who are involved in his harassment including employees of Respondent, EEOC, NLRB, OSHA, Federal Highway Administration, Senator Sam Nunn's office, Representative Cynthia McKinney's office, and local businesses (RX-1). Complainant indicated that his children were being affected at school and at his daughter's AKA debutante ball (RX-1; RX-4, 390; RX-34, 189). He believed that Respondent had somehow caused his music teacher to withdraw from teaching him and his children (RX-1; RX-4, 378). Complainant was no longer being asked to chaperone school band occasions and felt that Respondent had influenced the band to shun him in exchange for new instruments (RX-1, RX-4, 382). He felt that Respondent's counsel or Mr. John Fitzgerald from the EEOC was responsible for the foreclosure of his home (RX-34, 198). He indicated a belief that employees of local stores were EEOC investigators (RX-1; RX-4, 400). Mr. Griffin alleged that Egelston or the Teamsters were responsible for documents being removed from his home and stealing his sister's computer in which he had information stored (RX-4, 425, 427; RX-34, 199).

In the course of the first deposition, Complainant made three statements concerning the future safety of his driving. First, while referring to his discussion with the Clayton County District Attorney, Bob Keller, Complainant stated, "So it looks like what they want is an accident, *we have to give them an accident*" (emphasis added) (RX-4, 142). Second, Complainant stated, "Eventually I'm going to go out there and I'll probably have an accident. There may be one day that I've missed something. I might get in a hurry one day and forget to check something" (RX-4, 199). Finally, Complainant compared his situation with that of the ValuJet plane crash in Florida. "It's just like ValuJet. You just can't get anybody to do anything and then after people get hurt or somebody is killed then everybody wants to get up and do something. Same situation" (RX-4, 340).¹¹

Complainant stated several times that he had never had an accident or speeding ticket and could not understand why Respondent considered his continued driving a safety concern (*See, e.g.*, RX-34, 149, 151). According to a DAC motor vehicle report, Complainant was convicted of improper/erratic lane changes and speeding (105 miles per hour in a 55 mile per hour zone) on January 8, 1992 (RX-39).

On May 28, 1996, Respondent called Complainant to come to work. When he arrived at CF, he was told to see Jack Tisdale, who gave him a letter signed by Egelston, dated May 28, 1996 (RX-

¹¹Complainant submitted corrections to this deposition. However, Complainant is not permitted to change the substance of this sworn testimony because he does not like what it states, but only actual errors in the transcription. Complainant indicated several such errors in transcription, but any substantive changes will not be made. Particularly, Complainant attempts to delete the statement, "we have to give them an accident" on page 142 of the transcript. This is a substantive change and is not permitted.

34, 104-5). Complainant had a conversation with Tisdale concerning the letter, but at the time of the hearing could not remember what they discussed at that time (RX-34, 107). Three days before being relieved from service, Complainant received a safety award in recognition of his safe driving record (RX-34, 148).

Complainant participated in the standardized psychological tests on May 30, 1996. The next day Complainant met with Dr. Stock, but denies that any evaluation occurred (RX-34, 130). Complainant requested that Dr. Stock show some identification, and Dr. Stock refused to do so (RX-34, 131). Complainant then talked with Dr. Stock for “maybe a hour,” but the only thing they discussed was how much money Complainant wanted in settlement of his claims (RX-34, 132). Complainant characterized his conversation with Dr. Stock as “not the conversation of somebody evaluating . . . a person,” but, instead, was merely a casual conversation (RX-34, 135). Complainant was surprised to discover that Dr. Stock appeared to know that he had contacted the television show “Inside Edition” (RX-34, 135). He felt Dr. Stock was more concerned with finding out what Complainant knew about whom Respondent (specifically Egelston) was “buying off” (RX-34, 135).

Complainant talked to Dr. Stock by telephone at a later occasion and discussed the results of the psychological tests conducted on May 30, 1996. Dr. Stock informed Complainant that he did not find any problems in these tests and that Complainant generally did not admit to problems that many people will admit to (RX-34, 136-7). Complainant objected on several occasions to the evaluation by Dr. Stock because: 1) Dr. Stock is not a psychiatrist, but a psychologist; 2) Dr. Stock is licensed in Florida and Michigan and not Georgia, where his evaluation occurred; 3) Dr. Stock is a federal employee¹² (*See, e.g.*, RX-34, 34, 40, 161; RX-35, 221; RX-36, 2, 141, 143; Complainant’s Brief p. 1).

Complainant received a letter from Egelston on June 13, 1996 explaining Dr. Stock’s conclusions and Respondent’s response (RX-34, 154; RX-17). Complainant refused to see one of the psychiatrists suggested by Dr. Stock for three reasons. First, he felt that Respondent had not offered a satisfactory explanation for the first evaluation, as required by his union contract. Second, the June 13 letter from Egelston appeared to contradict what Dr. Stock had told Complainant by telephone. Third, Complainant wanted to pick his own doctor for a second opinion as required by his union contract (RX-34, 154).

Respondent continued to pay Griffin until the week ending October 5, 1996 (RX-34, 48). Complainant was notified of this action by letter from Egelston, dated October 7, 1996 (CX-3; RX-26). At this time, Complainant was under the impression that he had been terminated from employment with Respondent (RX-34, 50).

¹²Dr. Stock is not, in fact, a federal employee. He has performed some contract work as an instructor and consultant for the Federal Bureau of Investigation and the U.S. Secret Service. He has also consulted with the Federal Aviation Administration, U.S. Department of Justice, U.S. Department of Education and Inspector General’s office on specific psychological evaluations. However, his primary employment is in private practice as managing partner of IMG (RX-10).

Complainant testified that he began working for Super Service in November 1996 (RX-34, 18). Super Service received the November 4, 1996, letter stating Complainant's current position with Respondent about two weeks after Complainant began to work there (RX-34, 18). In addition, Complainant testified that Nail informed him that Jerry Ard from CF had come to Super Service and "cursed him [Nail] out" for hiring Complainant (RX-34, 30). He felt that his treatment changed at Super Service after it received this letter (RX-34, 17). Complainant testified that Super Service began to send him on "wild goose trips" and to violate their rule of assuring that the driver would be home at least every twelve days (RX-34, 18). Complainant was terminated on January 7, 1997, for being off route and refusing a dispatch. Complainant challenges both of these reasons for termination and contends that CF is responsible for his termination (RX-34, 22-3).

Complainant has filed charges not only against Respondent, but against several prospective employers for refusing to hire him unless he dropped the charges against CF (RX-34, 11). Specifically, Heartland Express and M.S. Carriers had informed Complainant that he should submit his resignation so they could get things "settled" (RX-34, 28). Another prospective employer, FEPCO, told Complainant that they would not "touch him" unless he withdrew his charges against Respondent (RX-34, 80). Complainant alleges that Respondent gave these employers false information.

Representatives of CFI, FEPCO, Heartland Express, J.B. Hunt and M.S. Carriers, all employers to whom Complainant applied, indicated that the only information they received from Respondent was identical to the letter sent to Super Service, indicating that Complainant was on a medical leave of absence (RX-38; RX-40; RX-42; RX-45; RX-48). The representative of Heartland Express indicated that Complainant was denied employment because he indicated that he was laid-off from CF, when in fact he was on a medical leave of absence, but if this discrepancy was cleared up he would be eligible for employment (RX-42). The representatives of CFI, FEPCO, J.B. Hunt and M.S. Carriers were unaware that Complainant had charges pending against Respondent when he applied for employment (RX-38; RX-40; RX-45; RX-48).

Complainant indicated that employees of Respondent had told him that guards were informing them that Complainant had been fired, had lost his lawsuit, and had threatened to kill his supervisors (RX-20, 28; RX-34, 181).

DISCUSSION

Complainant has the burden of making a *prima facie* case under the Act. To do so, he must prove four elements: 1) He engaged in protected activity; 2) Respondent subjected him to adverse action; 3) Respondent was aware of the protected activity when it took the adverse action; and 4) Evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action (causation). Auman v. Inter Coastal Trucking, 91-STA-32 (Sec'y July 4, 1992); Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y Dec. 15, 1992). At the hearing

Complainant presented no testimony, but rested his case on his documentary evidence. Respondent concedes that Complainant engaged in protected activity and that it had knowledge of the protected activity when it removed Complainant from service, terminated his pay and sent a referral letter to Super Service (Respondent's Brief, p. 4).

A. Adverse Action

Complainant contends that Respondent took adverse action to retaliate against him for filing a complaint on June 23, 1995, alleging that Respondent had forced him to drive unsafe equipment (CX-4). Three actions are at issue here. First, Respondent removed Complainant from service on May 28, 1996, on the recommendation of Dr. Harley Stock (CX-2; RX-12). Complainant remained out of service following an evaluation by Dr. Stock because he found that Complainant was temporarily unfit for duty (RX-17). Respondent does not contest Complainant's assertion that his removal from service was an adverse action (Respondent's brief, p.4). Second, Respondent terminated Complainant's pay on October 7, 1996, because Complainant had not complied with the conditions of his continued pay status (CX-3; RX-26). Third, Respondent wrote a letter to a prospective employer, Super Service, Incorporated, indicating that Complainant was "on an unpaid medical leave of absence, as a result of medical information indicating that he is temporarily unfit for service under the Federal Motor Carrier Safety Regulations" (RX-32).

An adverse action is one that shows discrimination regarding pay, terms, or privileges of employment. When considering whether Complainant established the elements of a *prima facie* case, it is improper to consider Respondent's reasons for its actions. Auman, 91-STA-32 (Sec'y July 24, 1992); Hernandez v. Guardian Purchasing Co., 91-STA-31 (Sec'y June 4, 1992); Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y Jan. 6, 1992). Thus, terminating Complainant's pay is clearly an adverse action. In addition, the reason that Complainant was not working and his pay status cut was the original adverse action of removing him from service.

The reference letter from Respondent to Super Service presents a more difficult issue. The letter simply stated the fact of Complainant's present position with Respondent.¹³ An arguably negative reference, in itself, is not an adverse action. Complainant continued to work for Super Service for two months following receipt of this letter, when he was terminated for an unrelated incident. Complainant argues that his treatment at Super Service changed following receipt of this reference, but this claim is entirely unsubstantiated (RX-34, 15-26). In fact, Complainant also noted that Nail, his supervisor at Super Service, indicated that he thought the letter was "bogus," and Nail specifically stated that the letter was not the reason for Complainant's termination (RX-34, 15; Tr. 127).

I find that the termination of Complainant's wages was an adverse action under the Act.

¹³Complainant presented no evidence regarding this incident. He presented no testimony at the hearing and his exhibits do not pertain to the reference letter to Super Service. Strictly speaking, a directed verdict on this issue is in order. However, I will consider all the evidence on all issues to avoid any possible prejudice to Mr. Griffin in light of the fact that he appeared *pro se*.

However, I do not find that the sending of the letter stating Complainant's present position with Respondent was an adverse action as it did not affect Complainant's pay, terms, or privileges of employment.

B. Causation

Direct evidence of causation is not necessary. Complainant need only raise the inference of that the protected activity was the likely reason for the adverse action by presenting sufficient evidence to prevail if not contradicted. Ass't Sec'y and Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995); Ertl v. Giroux Brothers Transportation, Inc., 88-STA-24 (Sec'y Feb. 16, 1989).

Griffin initially filed a complaint with OSHA on June 23, 1995 (CX-4). Respondent removed him from service on May 28, 1996, his pay was terminated on October 7, 1996, and the letter sent to Super Service on November 4, 1996 (CX-2; RX-12; CX-3; RX-26; RX-32). Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. Kovas v. Morin Trasport, Inc., 92-STA-41 (Sec'y Oct. 1, 1993) (citing Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987)). Respondent argues that the length of time between Griffin's complaint and any adverse action negates any inference of causation (Respondent's brief, p.4). The Secretary of Labor has stated that the time between the filing of a complaint and the adverse action that follows may be too remote to raise and inference of causation. Bolden v. Distron, Inc., 87-STA-28 (ALJ March 21, 1988), *aff'd*, (Sec'y June 3, 1988) (two events separated by fifteen months)¹⁴. However, in this case, Complainant has alleged in a previous claim that the adverse actions by Respondent began within a month of his filing the complaint with OSHA (RX-4, 124). Complainant's allegations present sufficient evidence of a continuing act of discrimination leading up to the adverse actions at issue here.¹⁵

Complainant has made a *prima facie* showing of discrimination for two of the adverse actions alleged: 1) his removal from service on May 28, 1996; and 2) the termination of his pay on October 7, 1996. He has not presented evidence necessary to create a *prima facie* case for the third alleged adverse action — the letter sent by Egelston to Super Service on November 4, 1996.

C. Respondent's Rebuttal

Once Complainant proves the four elements of a *prima facie* case, Respondent may offer a legitimate, non-discriminatory reason for adverse action. Complainant may then show that the protected activity was the more likely cause of the adverse action or that the reason offered by Respondent is not credible. Carroll v. J.B. Hunt Transport, 91-STA-17 (Sec'y July 23, 1992). Even

¹⁴The Secretary in a previous decision had noted that a ten month lapse may be sufficient to raise an inference of causation. See, Williams v. Southern Coaches, Inc., 94-STA-44 (Sec'y Sept 11, 1995).

¹⁵Again, at this point in the analysis, it is error for me to consider Respondent's reasons for its actions. Auman, 91-STA-32 (Sec'y July 24, 1992); Hernandez, 91-STA-31 (Sec'y Jun 4, 1992); Moravec, 90-STA-44 (Sec'y Jan. 6, 1992).

assuming, *arguendo*, that Complainant had made a *prima facie* case for the three adverse actions that he alleges, Respondent has presented a convincing, legitimate, non-discriminatory reason for its actions.

Respondent is bound by the Federal Motor Carrier Safety Act (FMCSA) and its implementing regulations. This statute states, *inter alia*, that, "An employer may not knowingly allow an employee to operate a commercial motor vehicle . . . during a period in which the employee . . . (1) . . . has been disqualified from operating a commercial motor vehicle." 49 U.S.C. §31304. The implementing regulation indicates what would disqualify an individual from operating a commercial motor vehicle. It states, "A person is physically qualified to drive a commercial motor vehicle if that person . . . (9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his ability to drive a commercial motor vehicle safely." 49 C.F.R. 391.41(b).

Respondent had good reason to believe that Complainant had a mental disease or psychiatric disorder which could interfere with his ability to drive a commercial motor vehicle. This would disqualify Complainant from his position as an over-the-road driver for Respondent. Respondent could not, under the statute, permit Complainant to drive. Complainant's letter to Judge Mollie Neal, dated May 12, 1996, raises a question about Complainant's state of mind (RX-1). He lists fifty-one witnesses who may have knowledge about possible discrimination by Respondent. Twenty-two of these witnesses are employees of Respondent. However, it is the other witnesses listed which would create genuine concern about Complainant's ability to drive safely. Complainant honestly believes that individuals from OSHA, FHA, EEOC, NLRB, the office of Representative Cynthia McKinney and Senator Sam Nunn are somehow involved in a conspiracy to protect Respondent. Particularly Complainant indicates that he saw Mr. John Fitzgerald from the EEOC at Representative McKinney's office, at the post office in Atlanta, and again at the Consumer Credit Counseling Service. Complainant believes Fitzgerald has been "influenced by my employer and is harassing my family in behalf of my employer" (RX-1, 5). Complainant also believes that Respondent is influencing Brenda Webb from EEOC to stall any investigation and give Complainant false information (RX-1, 5). Complainant indicated his belief that employees in stores near his home are actually employees of the federal government. This belief stems from Complainant's understanding that these individuals know Brenda Webb and have stated that they understand that Complainant works for the Postal Service (RX-1, 8). Such a conspiracy theory is of concern, even to one without psychological training.

Shortly after receipt of this letter, Respondent's attorney, Deborah Craytor, deposed Complainant in the presence of Eigelston. During that deposition, Complainant made three statements which could be interpreted as threatening possible dangerous actions by Complainant while driving his truck (RX-4, 142, 199, 340). In addition, Complainant made statements off the record at the deposition, indicating that he thought Ms. Craytor had arranged to have his house broken into, documents stolen, and his personal automobile stolen (Tr. 144). These threatening statements in conjunction with the statements regarding Ms. Craytor's involvement in the conspiracy against him offer further evidence of Complainant's tenuous mental state. However, Respondent did not release Complainant from duty at this time.

Eagelston contacted Dr. Wyatt to do an informal assessment of Complainant after receipt of the letter of May 12 (Tr. 141). Dr. Wyatt indicated that this letter raised concerns about Complainant's mental condition and indicated that Complainant may suffer from a delusional disorder (RX-2). Dr. Wyatt did not have access to Complainant's deposition transcript at the time of his diagnosis. Again, Respondent did not release Complainant from duty based on this informal evaluation.

Following the deposition, Eagelston became more concerned and sought assistance from Respondent's deputy counsel, who referred him to IMG and Dr. Stock (Tr. 144-5). Eagelston gave Dr. Stock a copy of the May 12 letter, Complainant's deposition transcript and Dr. Wyatt's letter (RX-1; RX-4; RX-2). Dr. Stock is a highly qualified psychologist who specializes in threat assessment in the workplace (Tr. 38; RX-10). Dr. Stock reviewed these collateral sources and opined that further assessment was necessary. He encouraged Respondent to remove Complainant from service, but to continue his pay to avoid making a difficult situation worse (Tr. 57). It was only at this time, on the recommendation of a qualified psychologist, that Respondent removed Complainant from service.¹⁶

Dr. Stock conducted a thorough evaluation of Complainant, including psychological testing and an extensive interview. Following this assessment, he concluded, as had Dr. Wyatt, that Complainant suffered from delusional disorder, persecutory type. As such, Complainant could display violent behavior against those he believed are harassing him (RX-15; RX-16). To avoid such behavior, Dr. Stock opined that Complainant was temporarily unfit for duty pending mandatory counseling. Dr. Stock went as far as to provide the names of two psychiatrists who were experienced with this disorder and were willing to take on such a patient (RX-15). Respondent followed Dr. Stock's recommendations, including keeping Complainant on a pay status, even though the collective bargaining agreement under which Complainant worked did not require such action (Tr. 150-1). Complainant did not comply with the conditions of his continued pay status. Respondent could not put him back to work without violating the FMCSA. Respondent had no choice but to place Complainant on a medical leave of absence without pay. The Act does not require that an employer continue to employ an individual indefinitely, merely because they have made a safety complaint.

Within a month of terminating Complainant's pay, Respondent received a request for employment information from Super Service, a potential employer (RX-31; Tr. 103). Respondent completed the simple form provided by Super Service and followed up with a letter indicating that Complainant was currently on a medical leave of absence. Respondent felt a duty to the public safety, at which the FMCSA is aimed, to inform prospective employers that Complainant was not fit to drive under the statute. Respondent's response went no further than necessary to meet this duty.

¹⁶Complainant has raised concerns about Dr. Stock's qualification to provide an opinion in this matter. Dr. Stock is *not* a federal employee, so there is no conflict of interest. Although Dr. Stock is not a *medical* doctor, he is a Ph.D. and is, therefore, a doctor. Dr. Stock is not licensed in Georgia, but may do one time evaluations in that state due to reciprocity with the states in which he is licensed, Florida and Michigan. Finally, as a doctor of psychology he is qualified to make a *psychological* evaluation, which is exactly what was conducted here.

Respondent not only had a legitimate reason for sending the November 4, 1996, letter to Super Service, but a duty under the FMCSA to do so.

Based on the opinions of two psychologists, Respondent had a reasonable belief that it would be violating the FMCSA by allowing Complainant to continue to drive. Respondent had a legitimate concern for public safety which prompted it to send a letter to Super Service on November 4, 1996. It had a legitimate non-discriminatory reason for all its actions at issue here.

Complainant's *prima facie* case as to the first two alleged adverse actions is rebutted by Respondent's showing of a legitimate, non-discriminatory reason for its actions. Complainant failed to make a *prima facie* case as to the third alleged adverse action, and any such showing would be rebutted by Respondent's showing of a legitimate, non-discriminatory reason.

ORDER

It is hereby RECOMMENDED that the claims filed by William E. Griffin under the Act be DENIED.

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/pak
Newport News, Virginia

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See Fed. Reg. 13250 (1990).